

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 1-09-50026-reg

Adversary Case No. 09-00504-reg

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In the Matter of:

GENERAL MOTORS CORPORATION,

Debtor.

- - - - -x

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF GENERAL MOTORS
CORPORATION,

Plaintiff,

-against-

JPMORGAN CHASE BANK, N.A. individually and as Administrative
Agent for various lenders party to the Term Loan Agreement
described herein, ABN AMRO Bank N.V. et al.,

Defendants.

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United States Bankruptcy Court

One Bowling Green

New York, New York

October 6, 2009, 9:55 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

1 HEARING re Chamber Conference (1) Fee Examiner; (2) Case
2 Management Order.

3

4 HEARING re Chamber Conference re: Evercore.

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6 HEARING re Application for an Order Pursuant to Section 327(a)
7 and 328(a) of the Bankruptcy Code and Bankruptcy Rule 2014(a)
8 Authorizing the Employment and Retention of Evercore Group
9 L.L.C. As Investment Banker and Financial Advisor for the
10 Debtors Nunc Pro Tunc to the Petition Date.

11

12 HEARING re Motion to Strike Ad Hoc Committee of Asbestos
13 Personal Injury Claimants' Objection to Motion to Extend Stay
14 to Certain Litigation filed by N. Kathleen Strickland on Behalf
15 Remy International, Inc.

16

17 HEARING re Motion to Extend Automatic Stay re: Remy
18 International, Inc.

19

20 HEARING re Debtors' Third Omnibus Motion Pursuant to 11 U.S.C.
21 Section 365 to Reject Certain Unexpired Leases for
22 Nonresidential Real Property.

23

24 HEARING re Debtors' Seventh Omnibus Motion Pursuant to 11
25 U.S.C. Section 365 to Reject Certain Executory Contracts.

1 HEARING re Motion of Debtors for Entry of Order Pursuant to 11
2 U.S.C. Section 105(a) and Fed. R. Bankr. P. 3007 and 9019(b)
3 Authorizing the Debtors to (I) File Omnibus Claims Objections
4 and (II) Establish Procedures for Settling Certain Claims.

5
6 HEARING re Motion to Extend Automatic Stay on Behalf of Detroit
7 Diesel Corporation to Cover Certain Litigation.

8
9 HEARING re Motion to Dismiss Party Detroit Diesel Corporation
10 (related document(s) 3960) Filed by Gerolyn P. Roussel on
11 Behalf of Jeanette Garnett Pichon.

12
13 HEARING re Adversary Proceeding Official Committee of Unsecured
14 Creditors vs. JPMorgan Chase Bank N.A. Pretrial Conference.

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24 Transcribed by: Pnina Eilberg
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(TELEPHONICALLY)

ALSO PRESENT TELEPHONICALLY:

RICK GASHLER, Interested Party; Sandell Asset Management

JENNIFER H. SCHILLING, Interested Party;

Capital Management

1 P R O C E E D I N G S

2 THE COURT: All right. GM, I'll start with the
3 matters that GM has where it's the movant. Then I will take
4 the status conference on the creditors' committee's adversary
5 against JPMorgan Chase and then I'll take the two motions by
6 the nondebtors vis-a-vis the extension of the stay. Go ahead,
7 please.

8 MR. LEDERMAN: Good morning, Your Honor. Evan
9 Lederman, Weil, Gotshal & Manges for the debtors.

10 THE COURT: Good morning, Mr. Lederman.

11 MR. LEDERMAN: Good morning, Your Honor.

12 We have three uncontested matters that are on for
13 today. I'm happy to walk the Court through them or if you'd
14 like --

15 THE COURT: I'll tell you the truth, Mr. Lederman,
16 since there were no objections under my case management order,
17 I hate to make your trip down here so meaningless but I'm of a
18 view to just approve them all.

19 MR. LEDERMAN: That's certainly fine with us, Your
20 Honor.

21 THE COURT: Okay. They're approved.

22 MR. LEDERMAN: Thank you, Your Honor.

23 THE COURT: Okay. We're now up to the adversary
24 proceeding against JPMorgan Chase?

25 (Pause)

1 THE COURT: All right. Let me just get to know you
2 guys. Tell me about your game plan for litigating this thing.

3 MR. FISHER: Good morning, Your Honor. Eric Fisher
4 from Butzel Long, special counsel to the creditors' committee.

5 As Your Honor is aware, this is an avoidance action
6 against JPMorgan and hundreds of other financial institution
7 defendants seeking to avoid significant amounts, in excess of
8 1.5 billion dollars, that was paid out postpetition.

9 Our game plan, Your Honor, for litigation the case is
10 we've conferred extensively with counsel for JPMorgan and we
11 have a plan to litigate this case quickly and without the
12 involvement of the hundreds of other defendants aside from
13 JPMorgan. JPMorgan served as administrative agent on the loan
14 that's really at issue here, the term loan. And the other
15 defendants are defendants to the extent that they received
16 payments under the loan. But neither side believes that those
17 hundreds of other defendants have meaningful discovery.

18 And so what we would propose to Your Honor today, and
19 we're prepared to hand up an agreed to scheduling order, is
20 that the creditors' committee's time to serve the summons and
21 complaint be extended out in total to 240 days. And that
22 JPMorgan and the creditors' committee have proposed -- will
23 propose a schedule that allows us to essentially litigate this
24 case from beginning through dispositive motions during that
25 period of time and have dispositive motions briefed to Your

1 Honor by March 2010.

2 THE COURT: Uh-huh. I may want to hear more from you,
3 Mr. Fisher. But I'd like to hear from counsel for JPMorgan
4 chase.

5 MR. CALLAGY: Good morning, Your Honor. John Callagy
6 from Kelley Drye & Warren representing JPMorgan Chase both
7 individually and as administrative agent, we were sued in both
8 capacities.

9 THE COURT: Your client has some of its own money
10 still in the facility?

11 MR. CALLAGY: Correct. Well actually the money has
12 been paid, as Your Honor knows. The money has been paid out of
13 the -- from the --

14 THE COURT: Okay. But it had a piece of the action --

15 MR. CALLAGY: Yes.

16 THE COURT: -- in the underlying indebtedness.

17 MR. CALLAGY: Yes.

18 THE COURT: It wasn't all, hundred percent, syndicated
19 out.

20 MR. CALLGY: Correct. So as Mr. Fisher stated, we've
21 been trying to wrestle with the idea of how do we get this
22 thing resolved without bringing in 300 other investors, members
23 of the syndicate. And it seems, even though JPMorgan is of the
24 position -- and we have provided evidence to the creditor's
25 counsel that there was no authority for the inadvertent filing

1 of the original UCC 3 which was actually filed on the wrong
2 loan at the time it was filed on the wrong loan at the time it
3 was originally filed.

4 Not being satisfied with that, we have offered to make
5 certain discovery available to them to try to satisfy the
6 creditors' committee that in fact there was no authority for
7 the filing of the UCC 3 on what we refer to as the term loan as
8 opposed to the other loan with a synthetic lease transaction
9 which was properly terminated back in 2006. When the UCC 3 was
10 filed terminating that loan and the UCC 3 was filed terminating
11 the so-called term loan or the collateral on the term loan, the
12 perfected nature of the term loan.

13 THE COURT: Uh-huh. All right. Here's what I want
14 you to do, folks. I want you to prepare a stip or consent
15 order that lays out what you're going to do. If it's along the
16 lines of what you described to me I'm not going to give you a
17 problem with approving it. I wanted to deal with the
18 participation of the non-Chase parties. What you folks are
19 going to do, how you're going to structure the discovery and
20 your recommendations for teeing up motions.

21 I do want to do a stop, look and listen as to whether
22 I think summary judgment's going to, which is what I assume you
23 mean by dispositive motions, is going to be productive or not.
24 I'm not saying that I would forbid people from doing summary
25 judgment motions but history has taught me that sometimes a

1 reality check is constructive.

2 Is there anybody, other than the two of you, who wants
3 to be heard on this adversary proceeding before I go further?

4 (No audible response)

5 THE COURT: I don't see anybody. Okay. Any problem
6 with doing that, Mr. Callagy?

7 MR. CALLAGY: Your Honor, we actually have prepared,
8 jointly, a stipulated scheduling order. And I believe that
9 it's on a disk pursuant to Your Honor's preference and it is --
10 we can make that available on short order.

11 THE COURT: All right. Mr. Fisher, you've reviewed it
12 and you're on board on that as well?

13 MR. CALLAGY: Yes, we agree with it and we're prepared
14 to hand it up right now.

15 THE COURT: Well handing it up right now isn't going
16 to accomplish much. But if you take it across the hall to my
17 courtroom deputy and tell her to put it in the pile for stuff
18 for me to see when I can get to it, I'll review it. And if
19 it's the way you described it, I'll approve it.

20 MR. CALLAGY: Can I have a little more guidance, Your
21 Honor, in terms of stop, look and listen in terms of how and
22 what form would you like us to provide that advice to the
23 Court?

24 THE COURT: Well I've got to tell you the truth, Mr.
25 Callagy. I triage my matters and I deal with the most urgent

1 ones and that's both in terms of preparing for hearings and
2 deciding disputes. I'm not up to speed on the underlying
3 issues in this adversary to the same extent I would be if you
4 actually had a motion before me rather than a status
5 conference. And unless I'm missing something, this is the
6 first status conference we've had in this adversary proceeding.

7 MR. CALLAGY: Yes.

8 THE COURT: What I normally do, and I see no reason
9 why this would be an exception, is I find out what somebody
10 wants to raise in the way of a dispositive motion and the
11 theory under which he or she or it thinks it should be granted.
12 And I don't look for a mini-briefing or mini-trial but I just
13 try to get the lay of the land and understanding of what is the
14 subject of the motion. Then I have, typically, a conference
15 call, if people are in town sometimes in person. I tell you my
16 views as to whether I would prefer to take a summary judgment
17 motion or whether I just prefer that you give me your direct
18 testimony affidavits and we try it.

19 MR. CALLAGY: Okay. Thank you. We will do that at
20 the appropriate time, Your Honor. Thank you.

21 THE COURT: Okay. Have a good day, folks.

22 MR. FISHER: Thank you, Your Honor.

23 THE COURT: All right. Now, do I have anything on the
24 calendar other than the Detroit Diesel and Remy motions to
25 extend the stay?

1 (No audible response)

2 THE COURT: All right. Are the movants here on that?

3 UNIDENTIFIED ATTORNEY: Yes, Your Honor.

4 THE COURT: Come on up, please. I'll hear first from
5 Detroit Diesel. Actually, no I want the movants on both to
6 come up and I also want you to come up, Mr. Esserman.

7 MR. CONWAY: Good morning, Your Honor. Michael Conway
8 of LeClair Ryan representing Detroit Diesel Corporation.

9 THE COURT: All right, Mr. Conway.

10 MR. CONWAY: Your Honor --

11 THE COURT: No, I'll take introductions and then I
12 have preliminary remarks. I don't want to hear argument yet.

13 MR. HEINEMAN: Good morning, Your Honor. Geoffrey
14 Heineman from Ropers Majeski Kohn and Bentley for Remy
15 International.

16 THE COURT: All right.

17 MR. ESSERMAN: Good morning, Your Honor. Sander L.
18 Esserman for the ad hoc committee.

19 THE COURT: All right. Gentlemen, the motion to
20 strike the -- yes?

21 MR. DEATON: Good morning, Your Honor. John Deaton, I
22 was admitted pro hac vice for four Rhode Island cases that are
23 affected by this.

24 THE COURT: Your last name again?

25 MR. DEATON: D-E-A-T-O-N, John Deaton.

1 THE COURT: All right. Gentlemen, the motion to
2 strike the asbestos committee's response on the ground that it
3 was filed thirty-six minutes late is denied. And I don't know
4 how people practice where you came from, but I'm not going to
5 speak at length on what I think of that motion, we're going to
6 deal with the merits.

7 Now, when it's time for Detroit Diesel and Remy to
8 speak I want you to brief me on the extent, if any, to which a
9 362 extension motion has ever been granted when the debtor
10 didn't ask for it and when the third party, which was seeking
11 to extend it, was professing to speak what was good for the
12 estate and the debtor and the creditors' committee didn't share
13 its view and didn't join in that kind of a motion.

14 I also want you to address the prejudice, to me, of an
15 incremental unsecured claim effecting the debtor's ability to
16 reorganize or creating material distraction to a management
17 operating its company and the extent to which impairing the
18 ability of tort litigants to go against a nondebtor is
19 consistent with the public interest. I'll start with you, Mr.
20 Conway.

21 MR. CONWAY: Thank you, Your Honor. I'll start with
22 your first inquiry with respect to a matter that's been raised
23 of this nature by a nondebtor where the creditors' committee
24 and the debtor did not join. Frankly, I'm not aware of any
25 case like that. I'm also not aware of any case which was

1 denied -- any motion was denied for those reasons. And I will
2 go so far as to say, Your Honor, that this motion was vetted
3 with the debtor before it was made and there is no concerns
4 raised to me from the debtor. I have no reason to believe that
5 the debtor has an issue with this and I suspect the debtor has
6 to realize that it's in the best interest -- in their best
7 interest not to have the distraction during this case of having
8 Detroit Diesel make claims for defense fees every time they're
9 incurred. We're talking about --

10 THE COURT: Well, it's a prepetition -- the
11 indemnification obligation, assuming it exists, is a
12 prepetition debt, right?

13 MR. CONWAY: Your Honor, the prepetition obligation
14 does exist. We have cases that relate to GM and because of GM
15 Detroit Diesel that get filed on a regular basis. Last year
16 there were 150, this year there are sixty-five. I suspect next
17 year there'll be new cases we haven't heard of. And I believe
18 the law is that a claim for indemnification that arises
19 prepetition based on a third party tort allegation gives rise
20 to a postpetition claim.

21 THE COURT: In anywhere other than the Third Circuit?

22 MR. CONWAY: Well, Your Honor, no. Most of these
23 asbestos claims seem to end up in the Third Circuit. No, I
24 can't give you --

25 THE COURT: Because the Third Circuit law in that area

1 is an aberration, right?

2 MR. CONWAY: I don't like to think of it that way,
3 Your Honor, since I'm arguing the same position.

4 THE COURT: Go on.

5 MR. CONWAY: Your Honor, the -- I think the crux of
6 your various questions was what is the harm to or what is the
7 impact on the GM bankruptcy. Obviously the GM bankruptcy is
8 not indicative of every bankruptcy we've ever seen; it's a
9 little bit larger.

10 It's difficult for any of us who are not in the day-
11 to-day trenches administering this bankruptcy to know how
12 different it is from others. But if we focus on this not
13 strictly as one of the largest bankruptcies in the history of
14 this country but rather as if it were any other bankruptcy,
15 there's no doubt that having hundreds of claims for
16 indemnification filed on a regular basis and having to do a
17 valuation hearing as to what the possible indemnification
18 claims would be going forward for those cases that haven't been
19 filed yet would be a tremendous burden to the estate. Whether
20 that's material, in light of the billions of dollars at stake,
21 in the GM bankruptcy is another question. But Detroit Diesel
22 Corporation, which was not in existence when any of these
23 claims were -- came to light, should not be held responsible
24 for the fact that it happened to be related to a debtor that's
25 larger than others.

1 The fact of the matter is, Your Honor, none of these
2 cases relate to claims made after Detroit Diesel came into
3 existence. They all relate to claims from the '60s, the 70s,
4 before Detroit Diesel was ever even considered by GM. I think
5 GM created Detroit Diesel in 1988 in a joint venture with the
6 Penske Corporation. And these -- this concept that these
7 plaintiffs are using to threaten liability here isn't that
8 there's a -- that Detroit Diesel's a joint tortfeasor. It's
9 that Detroit Diesel somehow has successor liability of GM.

10 GM didn't go out of business in 1988 and none of these
11 assets are related to a wholesale sale of assets of a business.
12 They were specific assets sold to a newly formed corporation.
13 Any claims that could have been made based on problems with
14 asbestos that GM had in the '60s and the '70s relate to GM.
15 That's why GM entered into an agreement that said any costs you
16 incur we'll pick up. Any liability you incur from a judgment
17 we'll pick up.

18 They had an insurance policy specifically related to
19 these claims, which will be attacked by Detroit Diesel
20 Corporation if there's an unpaid judgment for indemnification
21 or an unpaid claim for indemnification. And what we've got
22 here is an opportunity for these plaintiffs who would
23 otherwise, if these were just strictly claims against GM and
24 they would be standing in the shoes of every other unsecured
25 creditor of GM, it's an opportunity for them to say okay we'll

1 get a hundred cents on the dollar from Detroit Diesel. Detroit
2 Diesel will then be responsible for going to GM and getting
3 their share of the unsecured creditor's claim. And then going
4 to the insurance carriers who, under both Michigan and New York
5 law, would have to pay a hundred cents on the dollar from those
6 policies that exist to protect GM and are property of the GM
7 estate.

8 So now what they've done is they've -- one shifted the
9 burden to Detroit Diesel to get paid in full but they've also
10 stepped in front of all those creditors of GM that aren't going
11 to get paid in full. It's simply an end to run around the
12 Bankruptcy Code. It's not a situation here where we have joint
13 tortfeasors the way you have in most cases where there's a
14 request to extend the stay.

15 You've got debtors that request an extension of the
16 stay to protect their officers and directors. When the
17 officers and directors are clearly joint tortfeasors those
18 motions are granted typically because of the necessity at the
19 outset of a bankruptcy case. They're usually not stays that
20 last throughout the case but the fact of the matter is that's
21 not what A.H. Robbins was contemplating, it's what it's become.
22 H. Robbins contemplated what we have here, where you've got an
23 entity which is being sued not because it's a joint tortfeasor
24 but because it was once somehow a part of the debtor who was
25 the tortfeasor.

1 There's no case that's been cited in any of the briefs
2 that comes close to being an A.H. Robbins case as ours. Our
3 case, unfortunately, is raised in a bankruptcy where it's hard
4 to argue that the millions of dollars at stake, if not hundreds
5 of millions of dollars at stake, are material. Because the GM
6 case has billions of dollars at stake.

7 But again, as I pointed out Your Honor, I don't think
8 that Detroit Diesel should be penalized because GM's a big
9 case. I think the same principles should apply whether this
10 was a hundred million dollar bankruptcy or a hundred billion
11 dollar bankruptcy.

12 Now there's been some attack on this theory that
13 Detroit Diesel will be entitled to make a claim against the
14 insurance policies. Well as I point out, Your Honor, there's
15 no question under the bankruptcy law that these policies are
16 property of the estate. But there's also no question --

17 THE COURT: Don't bankruptcy courts traditionally make
18 a distinction between entitlement to the policies being
19 property of the estate and their proceeds being property of the
20 estate? And aren't we really talking about access to the
21 proceeds in contrast to the policy itself?

22 MR. CONWAY: Well at the end of the day, Your Honor,
23 nobody cares about the policies; they only care about the
24 proceeds. But I think that's true in every case. I think
25 that --

1 THE COURT: Yeah. But when does the debtor get the
2 proceeds of a liability policy?

3 MR. CONWAY: The debtor --

4 THE COURT: The debtor doesn't turn the proceeds of a
5 liability policy and turn it into a distributable sum for the
6 benefit of its creditors. It uses it to satisfy obligations
7 that it owes to the plaintiffs of America.

8 MR. CONWAY: Well Your Honor, I think that in this
9 case you're going to find that a number of the creditors out
10 there are going to be creditors with claims that fall under
11 these policies. If those creditors receive a recovery, whether
12 it be ten cents on the dollar or one cent on the dollar, that's
13 a claim that the GM estate has against that insurance policy
14 for reimbursement so that they can then increase the pool for
15 the creditors.

16 There's no reason why the pool that GM has established
17 for its unsecured creditors should be diminished if there's an
18 insurance policy in effect. The insurance policy proceeds
19 aren't, somehow, cut away from the bankruptcy estate here.
20 They are going to be available -- if there are claims made
21 they're going to be made available to GM if there are claims
22 made against GM that qualify under the policy.

23 Now I agree with you that Detroit Diesel is interested
24 in the proceeds of the policy but so is GM. And the fact of
25 the matter is, Your Honor, if the debtor was concerned about

1 having some negative impact of extending the stay, I imagine
2 they probably would have put in papers objecting to the
3 extension of the stay. The fact that they didn't, I think --

4 THE COURT: Well, could there be a middle course, that
5 the debtor doesn't care? That it doesn't regard -- the effect
6 on the estate is material enough to waste the 5,000 dollars
7 applying something that might cost it?

8 MR. CONWAY: Your Honor, that's exactly why we're here
9 making the motion and the debtor isn't. Because from the
10 debtor's point of view this case is very complicated. There's
11 an administration that involves issues that prevent it from
12 really focusing on the problems of Detroit Diesel Corporation,
13 of Remy. They don't have the time to do this, but we do.
14 Maybe if they had another couple of years to focus on this
15 they'd get around to it. But the fact is, they don't have the
16 time we do, that's why we're making the motion. And frankly,
17 Your Honor, if the debtor didn't care then -- well Your Honor,
18 that's entire possible, they don't care. But it seems unlikely
19 that they wouldn't take some position either for or against the
20 motion. What they don't care about is incurring the expense of
21 either supporting or objecting to the motion given the fact
22 that there's no harm to the estate. And in fact it's pretty
23 clear from the papers there's a benefit to the estate, however
24 material. There's a benefit to the estate so why should they
25 put in those few dollars, if you want to call it, 5,000 dollars

1 or whatever. It's something that they're leaving to Detroit
2 Diesel's counsel and Detroit Diesel's pocketbook. And there's
3 nothing wrong with that. There's nothing about that that
4 should imply that it's not acceptable under the code to do it
5 this way. There's nothing -- there's no case that says this is
6 how you do it, if the debtor doesn't bring the motion, relief
7 denied. There's no statute that says if the debtor doesn't do
8 it, relief denied.

9 What we have here is a situation where, again, we've
10 got a case that's larger than most where the debtor's counsel
11 probably just don't have the time to give it as much
12 consideration as counsel for Detroit Diesel.

13 I'd like to think I answered your questions, Your
14 Honor, but if I didn't --

15 THE COURT: Okay. Anything else?

16 MR. CONWAY: No, Your Honor. I believe the papers
17 answer every other question that might be asked.

18 THE COURT: Very well. Mr. Heineman?

19 MR. HEINEMAN: Good morning, Your Honor. Geoffrey
20 Heineman from Ropers Majeski Kohn & Bentley for Remy
21 International.

22 I don't really have much more to add that my cocounsel
23 hasn't already made. I just want to address, just one or two
24 points, one of which is just to make sure there's an
25 understanding Remy was -- Remy, in 1994, purchased the assets

1 of the Delco Remy division. All of the litigations, the five
2 litigations that we're involved in all relate to alleged
3 exposure to asbestos prior to 1994. So that all arises out of
4 GM products and GM premises and that's why we believe the
5 expansion of the stay is appropriate. I would note that we did
6 notice the plaintiffs in all five of those actions, none of
7 those plaintiffs have opposed the motion. In addition, none of
8 the members of the ad hoc committee are plaintiffs in any of
9 the cases that Remy is a defendant in.

10 With respect to the insurance issue, Your Honor, you
11 make very valid points with respect to that. Remy, as a
12 division -- the Remy division of General Motors pre-1994 would
13 in fact be insured under General Motor's policies. These are
14 all occurrence based policies, the policies that are
15 potentially at play in these five litigations are all current
16 space policies that were in effect when the alleged exposure
17 happened, which could be five years, ten years, fifteen years
18 before 1994.

19 To the extent Remy was a division during that time
20 period, Remy would have been insured and therefore Remy would
21 be entitled to make claim under those policies. Which
22 obviously would impact the estate.

23 I think the rest of the points have all been made,
24 Your Honor, and I don't want to waste the Court's time
25 reiterating the points that my cocounsel has made.

1 THE COURT: Very well. Thank you. Mr. Esserman?

2 (Pause)

3 MR. ESSERMAN: Your Honor, Sandy Esserman for the ad
4 hoc committee. I just have a couple points I'd like to raise.
5 I think we've addressed most everything in our papers. We do
6 think the form of these motions are inappropriate and they
7 should be brought by adversary proceeding.

8 I would note that the Remy motion was filed September
9 16th and there was an objection by one of the claimants that
10 are the subject of the Remy motion filed, they joined in our
11 papers.

12 Further, there's been some discussion of insurance.
13 We've asked for the insurance policies. The only thing we've
14 heard colloquial in this court is that there's a twenty-five
15 million dollar deductible on these insurance. So I don't know,
16 in fact, that there is any insurance that's realistically
17 available to any claimant. I think that came out during the
18 sale motion. So I don't know that joint insurance is somehow
19 an issue and I don't know that these entities are even covered
20 by it.

21 Other than that, we've made all the points in our
22 papers. Thank you.

23 THE COURT: Okay. Anybody else want to weigh in?
24 Yes, sir. Come on up, please.

25 MR. DEATON: Thank you, Your Honor. Your Honor, John

1 Deaton, D-E-A-T-O-N, for four individual plaintiffs in the
2 state of Rhode Island.

3 I'm not going to belabor points but I want to make a
4 few observations. The first observation I would make, and I
5 want to thank the Court for letting my clients be heard and my
6 pro hac vice motion. Counsel for Detroit Diesel not only in
7 their brief but in their oral argument makes averments and they
8 want the court to accept those averments as evidence. There is
9 no evidence, whatsoever, in their brief.

10 For example, in their oral argument they say none of
11 these claims deal -- they deal with the '50s and the '60s and
12 the '70s. Well I might know my cases because I'm a tort
13 attorney, I'm not a bankruptcy attorney, a little bit better
14 than Detroit Diesel's counsel but that's a factual issue.

15 The Kroskob case is a forty-four year old living
16 mesothelioma case.

17 THE COURT: Forgive me, Mr. Deaton, and I know you
18 don't appear in bankruptcy court as often as some of the other
19 folks in the room.

20 MR. DEATON: Yes, sir.

21 THE COURT: But I need to focus on the matters of
22 bankruptcy law and I don't think it's either necessary or
23 appropriate for me to delve into the merits of the individual
24 lawsuit or lawsuits that you might be prosecuting. It seems to
25 me that that's an issue for the foreign court to decide if I

1 allow that lawsuit to continue.

2 MR. DEATON: Yes, Your Honor. The only point that I
3 was making was that counsel in their oral argument said all of
4 these cases predate the '94 or not even to the '90s and that's
5 not true. The Kroskob case does go into the '90s. So I just
6 wanted to make that factual distinction since they addressed
7 it.

8 I'm not going to go into the merits or the procedure
9 other than to say that Your Honor just raised an important
10 issue which is the foreign state. Detroit Diesel removed the
11 claims to Rhode Island Federal District Court, got an extension
12 and then we're here today. If this Court does not make some
13 type of findings of fact or conclusions of law related to the
14 bankruptcy matter, then I would be fighting this fight in Rhode
15 Island Federal District Court where the intent will be to put
16 it in the NDL. And so this is the right court to hear the
17 merits, not of the individual cases but of Detroit Diesel's
18 claim, Your Honor. And the only thing I would --

19 THE COURT: Why should I be doing anything more than
20 dealing with the bankruptcy issues? Why should I be telling an
21 Article III district judge how to manage his docket if he's got
22 the case before him? Or if, for that matter, he wants to
23 remand it that would, at least, seemingly be his business. If
24 he wants to keep it and try it himself, that would at least
25 seemingly be his business. Or if he wants to MDL it for

1 pretrial purposes before he hears it, I mean that's the way 28
2 U.S.C. 1407 works, isn't it?

3 MR. DEATON: Understood, Your Honor. But Detroit
4 Diesel gave me notice and placed my plaintiffs and their claims
5 in peril before this Court. And with all due respect to my
6 fine judges in Rhode Island, they don't have the bankruptcy
7 expertise that this Court has.

8 And the only comment I want to make, Your Honor, is
9 that when you read the brief by Detroit Diesel it is a pyramid
10 of possibilities and inferences. And the only comment I'll
11 make is that they say they may have a claim for
12 indemnification, they may be able to recover the debtor's
13 insurance. Should they receive a judgment then maybe a
14 judgment in an asbestos case could be used as offensive
15 collateral estoppel against the debtor. It's possible that a
16 subsequent suit for indemnification may follow.

17 And finally, Detroit Diesel might be successful in
18 indemnification action. That's six hypothetical possibilities,
19 Your Honor. And zero plus zero six times equals zero.

20 Thank you.

21 MR. HEINEMAN: Your Honor, if I could just add one
22 point?

23 THE COURT: Yeah. I'll give you a chance to reply but
24 I want to deal with things in an order. Is there anybody who
25 hasn't been heard a first time before I give Mr. Heineman a

1 chance to be heard a second, that is who hasn't been heard a
2 first time who wants to be heard a first time?

3 MR. ROUSSEL: Yes, Your Honor.

4 THE COURT: Wait, was somebody speaking up?

5 MR. ROUSSEL: Yes.

6 THE COURT: Is there somebody on the phone?

7 MR. ROUSSEL: Yes.

8 THE COURT: Well speak up, sir. Tell me who you are,
9 first.

10 MR. ROUSSEL: This is Perry Roussel. I'm the attorney
11 for Jeanette Pichon that filed an objection in this case. Can
12 you hear me, Judge?

13 THE COURT: Not very well, Mr. Roussel, so try to
14 speak up.

15 MR. ROUSSEL: I just wanted to point out, besides what
16 my -- the other attorneys have stated objecting to this motion,
17 is that the A.H. Robbins case filed by the debtor is completely
18 different than what Detroit Diesel is attempting to do in this
19 case.

20 I mean, in A.H. Robbins basically the -- a property of
21 the estate was brought in and it was a debtor's estate. And
22 also the employees of the company was covered by the state and
23 we all know that employees of a company aren't the ones that
24 cause the liability, a corporation can only act through its
25 employees.

1 What A.H., I mean what Detroit Diesel is requesting
2 here is more analogous to having Allstate Insurance Company
3 filing bankruptcy and all of the persons that caused an
4 automobile accident around the country applying for coverage in
5 the bankruptcy stay. Which -- and all of those individuals
6 would be independently liable for their actions and could not
7 fall under the bankruptcy estate.

8 There's no basis for what Detroit Diesel is attempting
9 to do here in bankruptcy court. And again, we would ask that
10 that motion be denied.

11 I have nothing further to add except that my brief has
12 been filed.

13 THE COURT: All right. Mr. Conway, anything further?

14 MR. CONWAY: Only a quick response to the extent
15 necessary, Your Honor. Again, counsel for Mr. Pichon likens
16 our case to one where there are joint tortfeasers. Nobody's
17 alleged Detroit Diesel Corporation is a joint tortfeaser but
18 rather successor in interest to a joint tortfeaser -- to a
19 tortfeaser.

20 Similarly, Your Honor, the allegation that there's no
21 evidence here is refuted by our papers which are full of
22 evidence. We've got witness statements and the documents
23 involved. And Mr. Pichon, who's on the phone, has filed in his
24 compliant which identifies the fact that his client was
25 involved in exposure to asbestos during 1955 to 1975, not after

1 1988.

2 Thank you, Your Honor.

3 THE COURT: All right. Mr. Heineman, anything
4 further?

5 MR. HEINMAN: Just one or two points, Your Honor. In
6 contrast to the issues that I've just heard with regard to
7 Detroit Diesel, there is no dispute that Remy is entitled to
8 absolute indemnity here. There have been nineteen cases
9 commenced since 1994. The debtor has indemnified Remy in each
10 and every one of those cases where defense costs as well as any
11 losses and settlements.

12 Also, with respect to this motion we're only seeking a
13 stay with respect to Remy. General Motors is a defendant in
14 those five cases. The claims have been stayed as to General
15 Motors. We're seeking a stay only as to Remy not to any other
16 defendants. We're not seeking to have the case transferred to
17 this court; we're not seeking to have the case stayed in its
18 entirety.

19 Thank you, Your Honor.

20 THE COURT: All right. Very well. Everybody sit in
21 place for a minute.

22 (Pause)

23 THE COURT: All right. Ladies and gentlemen, I am
24 denying each of the motions and the following are my findings
25 of fact and conclusions of law in connection with this

1 determination.

2 First, as facts, I find that each of the two movants
3 is not a debtor in this case. Nor has it been suggested or is
4 it the case that either has been deputized by the debtor with
5 the approval of the Court to act on behalf of the estate.

6 I further find that each of the two movants is a
7 defendant in one or more litigations against it, asserting
8 liability on behalf of the movant to one or more folks who are
9 suing or who might later sue asserting liabilities for injuries
10 associated with exposure to asbestos. Though not strictly
11 relevant to this determination, I emphasize that I am
12 expressing no views and am making no findings of fact with
13 respect to the liability, if any, by any one of the movants to
14 any asbestos litigant.

15 In the case of one of the two movants, it has been
16 alleged that the debtors have an indemnification obligation to
17 the movant, in the other case that it may have. Ultimately,
18 the extent to which the may turns into a does is irrelevant to
19 my determination because even assuming for the sake of argument
20 that the debtors do have such obligations to indemnify, their
21 unsecured claims, at least in this district and circuit. In
22 fact, so far as I'm aware, in every district and circuit other
23 than the Third. And because they're prepetition claims, we're
24 not talking about administrative expense exposure in either
25 event. So if and to the extent any indemnification obligations

1 exist, they're garden variety prepetition claims.

2 There is also been some, but not much, showing that
3 the debtors have insurance, although the amount of the
4 deductible is not established. Once more, I don't need to make
5 findings of fact on that because the briefing confused
6 insurance policies being property of the estate with the
7 proceeds. Insurance policies are always, or almost always,
8 property of the estate. But whether their proceeds are
9 property of the estate depends upon the extent to which there
10 is any realistic expectation that the debtor would have access
11 to the proceeds by which it could get that money in the till
12 and use it for debtor needs and concerns.

13 There has been no material showing that in these --
14 that these policies would give rise to a pot of cash that
15 creditors could turn into additional recoveries for themselves,
16 I'm sure creditors wish it were otherwise but that's simply not
17 the case.

18 I further find as facts that the defense of these
19 asbestos actions would have no material affect on the debtor's
20 reorganization or, for that matter, their liquidation. They
21 would not -- there's been no showing that they would give rise
22 to material distraction of management or impair management
23 doing its job. And while I assume, without deciding, that if
24 the indemnifications were allowed they would result in some
25 incremental dilution of other unsecured creditors' recoveries

1 since it's at least foreseeable that we're going to have a pot
2 plan here. For the benefit of the unsecured creditor community
3 the incremental affect is not likely to have a material affect
4 on either the estate as a whole or on any of the other
5 creditors' recoveries.

6 Now as conclusions of law and bases for the exercise
7 of my discretion I state the following. First of all, as a
8 conclusion of law, while a motion to extend the 362 stay is, in
9 the view of most, a contested matter and an effort to grant a
10 supplemental injunction under 105(a) to protect against the
11 assertion of third party claims does, as Mr. Esserman argued,
12 require an adversary proceeding. I say this mainly, however,
13 for the benefit of the bar going forward because there are so
14 many reasons why the relief isn't appropriate here anyway that
15 this observation is not, by itself, dispositive in this case.

16 In this instance I have to deal with two other major
17 deficiencies, the second deficiency breaking down to three or
18 four separate deficiencies. The first is that as we
19 established in oral argument there is no reported case in which
20 an injunction of the type sought here has ever been granted
21 when sought by somebody other than the debtor, a trustee or at
22 least the estate. I guess there's no case to the contrary
23 either; a request of this character is unprecedented.

24 The normal circumstance under which either we extend
25 the scope of the 362 stay or grant a 105(a) injunction is to

1 protect the estate. And when the estate needs protecting, it
2 asks for it. And I don't know how many times cases on my watch
3 have presented exactly this issue but it's because the debtors
4 have asked for it. And here, at the risk of stating the
5 obvious, we don't have that type of situation.

6 I don't need to say that such a request never could be
7 granted. Perhaps it can be theorized that if a debtor sat on
8 its hands, and didn't do its job and an injunction of this
9 character were necessary to protect the creditors of the
10 estate, just like we sometimes grant STN authority such a
11 request might be considered, but this isn't such a case.

12 I'm confident that with counsel of the quality that we
13 have here representing the debtors and the creditors'
14 committee, if either of them thought relief of this type was
15 necessary to protect the interest of the estate we would have
16 heard about that.

17 Getting beyond that, we traditionally look at
18 particular factors to grant relief of this character. To be
19 sure, as some of the papers note, irreparable injury is not
20 required to grant relief of this character but some injury is.
21 There's got to be some reason for granting the relief. It may
22 be it needn't be irreparable but you've got to show something.
23 And here, as I found as a fact, there is no material affect
24 upon the estate or upon its ability to reorganize or upon its
25 ability to liquidate.

1 The factor of likelihood of success in reorganizing is
2 kind of a head scratcher here because this isn't going to have
3 an effect upon reorganization either way. So while I think it
4 is true that the debtors are going to reorganize, or to put it
5 differently, I think it's true that the debtors are going to be
6 successful in taking the pot of cash they have and giving it to
7 their creditors and then confirming a plan to make that happen,
8 this motion has no effect on that one way or the other.

9 Another factor is balancing of the harms. Now here we
10 have another head scratcher because the usual way by which
11 we've historically looked at the balance of the harms is to
12 look to the harm to the debtor, which is the one that's
13 normally asking for relief of this character, and the harm to
14 the enjoined party or to the party that's on the receiving end
15 of the broader extension of the stay.

16 While there is harm to tort litigants in having a
17 delay in the consideration of their claims, now sometimes,
18 probably more often than we'd wish but often we've got to deal
19 with that and it's an unfortunate consequence of the need to
20 reorganize debtors. But here we have no material prejudice to
21 the debtor at all. So that balancing tips dramatically in
22 favor of not granting the injunction and simply allowing tort
23 litigants to have their day in court.

24 Now why don't we extend that to the means or manner by
25 which this request is unprecedented? It's unprecedented

1 because this is the first case I've seen in my forty years
2 of -- not forty, thirty-nine, years of doing this stuff where
3 we've ever had a nondebtor asking for this relief as contrasted
4 to a debtor.

5 There is some, but not much, prejudice to the movants.
6 They have to defend themselves in a court of law like other
7 defendants have to do all the time. There's nothing about this
8 that ties their hands in putting forward their defenses to the
9 tort litigants who are suing them but they're prejudiced in the
10 sense that they're losing the freebee of the benefit by
11 availing themselves of the opportunity to have the Court get in
12 the way of the litigation that they'd otherwise have to defend.

13 Now are they prejudiced by having to defend themselves
14 and if it ultimately turns out that they did something for
15 which they're liable having to pay in real one hundred cent
16 green dollars of the United States when they recover their
17 indemnification, if at all, in baby bankruptcy dollars? Sure.
18 But that's no different than the prejudice that all of the
19 other creditors of this estate have to suffer. People who have
20 direct claims against the estate, including perhaps the
21 asbestos victims themselves, other tort litigants, bondholders,
22 people who slipped on the ice in front of GM's plant, everybody
23 has to take their recoveries in little baby bankruptcy dollars.
24 And that is not the kind of legally cognizable injury that we
25 weigh in evaluating the balance of harms.

1 And lastly, there is the public interest. I'm going
2 to say, for the second or third or fourth time, that I express
3 no view on whether, when this case or these cases get
4 litigated, the asbestos plaintiffs are going to win or lose.
5 Frankly folks, that's not my business to decide. I have no
6 ability to decide that nor should I decide that. But there is
7 a public interest in giving them their day in court unless
8 other factors important to the conduct of the bankruptcy case
9 trump that goal. Here there is no such countervailing policy.

10 For all of the foregoing reasons the two motions are
11 denied. Mr. Esserman, I'm going to look to you to carry the
12 ore for the prevailing parties to settle an order in accordance
13 with the foregoing.

14 MR. ESSERMAN: I will. Thank you, Your Honor.

15 THE COURT: All right. Am I correct that we have no
16 other business today?

17 (No audible response)

18 THE COURT: Then we're adjourned.

19 MR. HEINEMAN: Thank you, sir.

20 MR. ESSERMAN: Thank you, Your Honor.

21 (Proceedings Concluded at 10:46 a.m.)

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I N D E X

RULINGS

	Page	Line
All Uncontested Matters,	9	21
Of the Day, Approved		
Motion to Strike Asbestos	16	3
Committee's Response,		
Denied		
Motions to Extend Stay,	32	24
Denied		

1
2
3
4
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6
7
8
9
10
11
12
13
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C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a true and accurate record of the proceedings.

Pnina Eilberg
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